

The facts of the present case are somewhat similar to the facts of that case in that the inaccurate description given in regard to the proposer's name was effected by Mr. Gan and so was the answer to the question and thereupon Mr. Gan himself issued the cover note with the insured described as "Ng Hwee Bin (Deceased)", and subsequently so described in the insurance policy. As far as Gan was concerned there was no mistake as to the identity of the insured.

Chang Min Tat J. (as he then was) in *Poh Sin Mining Co. v. Welfare Insurance Co. Ltd.*⁽³⁾ said that —

"If there was a latent ambiguity in the policy extrinsic evidence was admissible to identify the persons and things referred to in the policy....."

In the present case my view is that the facts clearly show that both Minsoon Credit Corp. and the plaintiffs had full knowledge that Ng Hwee Bin had died and Ng Moh Chee who at all material times was managing the estate of the deceased took out the policy in respect of the motor-lorry belonging to the estate.

There was evidently no question of any non-disclosure or misrepresentation in the proposal form relating to a material fact.

Even assuming there was a non-disclosure and misrepresentation it was held by the Federal Court in *Tan Kang Hua v. Safety Insurance Co.*⁽⁴⁾ that if "the insurers were aware of the facts which were alleged to have been concealed by the defendants at the time of the issue of the policy, they were not entitled to the declaration they asked for" — i.e. a declaration to avoid the contract.

For reasons I have stated, it is my considered judgment that the plaintiffs are not entitled to a declaration that they be entitled to avoid the policy.

The plaintiffs' claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *R.K. Nathan & Co.; Lee Boon Peng & Co.*

A PUBLIC PROSECUTOR v. RAYMOND CHIA KIM CHWEE & ANOR.

[A. Cr. J. (Mohamed Azmi J.) September 13 & 15, 1982]

[Kuala Lumpur — Criminal Appeals Nos. 87 and 88 of 1982]

B *Criminal Law and Procedure — Charge of forgery of particular documents — Applications for documents in the possession of prosecution to be supplied to accused — Application allowed in respect of documents specifically referred to in charge and documents removed by prosecution from possession of accused — Appeal — Whether appeal lies — No summons for production issued — Appeal allowed — Particulars of charge to be supplied to accused — Criminal Procedure Code (F.M.S. Cap. 6), ss. 15, 152, 153, 154, 173 & 307(i) — Penal Code, ss. 34, 467 & 471.*

C In this case the two respondents were charged with three others for the offence of forgery under sections 467 and 471 of the Penal Code read with section 34 of the Code. In the charge they were alleged to have used dishonestly a letter of credit for the amount of \$2.4 million with certain named documents. The two respondents applied for various documents in the possession of the prosecution including the five documents mentioned in the charge for their inspection. The learned President of the Sessions Court made an order in favour of the respondents confined to the inspection of (1) documents specifically referred to in the charge and (2) documents removed by the prosecution from the possession of the respondents. The Public Prosecutor appealed.

D **Held:** (1) the order made by the learned President was not a procedural order but a final order purportedly made under section 51 of the Criminal Procedure Code and it was therefore appealable under section 307(i) of the Criminal Procedure Code;

E (2) the proper procedure would be for the requesting party to make an application for a summons to be issued by the court against a particular person and to specify the documents or property required to be produced by such person. In this case no summons had been issued and on the facts no summons could have been issued as the application was too general in the case of Raymond Chia and too all-embracing in the case of Zainal. In the circumstances the learned President cannot be said to have exercised his discretion judicially in granting the order even if summons had been served on the Public Prosecutor in the first instance;

F (3) in cases of forgery where various documents had been specifically referred to in the charge in respect of which the forgery was alleged to be perpetrated, the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instructions to his counsel before trial;

G (4) in this case copies of the five documents referred to in the charge ought to be annexed to the charge. In the circumstances the prosecution could not be prejudiced by supplying photostat copies of these documents to the respondents.

Cases referred to:

(1) *Anthony Gomez v. Ketua Polis Daerah, Kuantan* [1977] 2 M.L.J. 24.

- (2) *Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49.
- (3) *Public Prosecutor v. Teoh Choon Teck* [1963] M.L.J. 34.
- (4) *Public Prosecutor v. Hoo Chang Chwen* [1962] M.L.J. 284.
- (5) *Public Prosecutor v. R.K. Menon & Anor.* [1978] 2 M.L.J. 152.
- (6) *Kashi Ram Khosla & Ors. v. Dikshit A.I.R.* 1926 Oudh 280.
- (7) *Selangor United Rubber Estates Ltd v. Cradock & Ors.* [1968] 1 All E.R. 567.
- (8) *Syed Abubakar bin Ahmad v. Public Prosecutor* [1982] 2 M.L.J. 186, 187.

CRIMINAL APPEAL.

Shaik Daud (Deputy Public Prosecutor) for the appellant.

V. Balasingam for the first respondent.

K.B. Thuraisingham for the second respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: The two respondents were charged with three others for the offence of forgery under sections 467 and 471 of the Penal Code read with section 34 of the said Code. In the charge preferred against them, they were alleged to have used dishonestly, a letter of credit for the amount of \$2.4 million with the following forged documents:—

- (i) Bill of Lading;
- (ii) Certificate of Origin;
- (iii) Certificate to the effect that the motor tanker "GRACITA" on which the shipment of 2000 metric tons of palm oil is shipped, is used exclusively for palm oil conveyance;
- (iv) Certificate of Inspection;
- (v) Certificate of Weight.

After they were jointly charged in the Sessions Courts, the two respondents Raymond Chia (3rd accused) and Zainal (2nd accused) applied to the President by Miscellaneous Criminal Applications for various documents in the possession of the prosecution including the five documents stated in the charge for their inspection. In the case of Raymond Chia, his application was in general terms. He applied for an order "that the Public Prosecutor do allow the defence an opportunity to inspect and make photostat copies of all documents seized by the Jabatan Peguam Negara and/or which are in their possession and/or control in

A connection with the above criminal case". His ground for making the application was that without a reasonable opportunity of studying the documents, he would not be able to prepare his defence adequately or give proper instructions to his counsel in the conduct of the criminal case. In the case of Zainal, his application was for an order that the Public Prosecutor do deliver to him copies of a long list of specified and unspecified documents comprising of 29 categories in all, including cautioned statement and first information report. The reason for the application as contained in paragraph 10 of his affidavit was that he wanted some of the documents in advance to prepare adequately his defence to the charge and in the event that copies were not supplied to him sufficiently in advance, he would be compelled to seek adjournment to study the documents as and when they were introduced in evidence which would result in a delay of the trial. Both applications did not indicate under what provisions of the law the order to inspect and obtain copies of such documents could be made.

When the two applications came up for hearing before the learned President on June 8, 1982, the prosecution objected to both applications although they rightly did not object to the inspection and supply of the first information report and cautioned statement having regard, no doubt, to the decisions made in *Anthony Gomez v. Ketua Polis Daerah, Kuantan*⁽¹⁾ and *Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur*.⁽²⁾ The prosecution objection was twofold. First, they argued the respondents did not indicate under what provisions of the law their applications were made. Secondly, if their applications were made under section 51 of the Criminal Procedure Code, they were not made in compliance with the provision of that section due, *inter alia*, to lack of particularisation. The application of Raymond Chia was made in general terms and did not particularise the documents required, and as for Zainal's application, the documents sought were all-embracing and even included documents not seized from him. At the conclusion of the hearing, the learned President did not allow the applications *in toto* but his order in favour of the two respondents were confined to the inspection of (1) documents specifically referred to in the charge, and (2) documents removed by the prosecution from the possession of the respondents. In exercising his discretion the learned President relied heavily on the judgment of Hepworth J. in *Public Prosecutor v. Teoh Choon Teck*⁽³⁾. In that case the accused was charged for forgery on two counts. He was alleged to have

forged a letter and a cheque. Prior to the accused being charged, the Police had searched his house and taken away a number of documents among which was the letter referred to in the first charge. The accused's problem was that in order to be in a position to put forward the defence that the signatures of the two documents were in fact those of the complainant, it was essential for him to have before the trial either the original cheque and letter or photostat copies of them to obtain the advice of his handwriting expert. It was on these facts that the learned Judge had this to say at page 36:—

“As these documents were specifically referred to in the charges and as it was essential for the accused to have the originals or photostat copies in order for him properly to prepare his defence, which could not otherwise be prepared, it seems to me that the Public Prosecutor in order to ensure that justice was not only done but seen to be done should not have raised objections, on the particular facts of this case, to the defence being supplied with photostat copies of the letter and the cheque and also any other documents removed from his possession which he required for the furtherance of this defence, for example a letter or letters in the handwriting of the complainant.”

Before me, both counsel for the respondents raised a preliminary objection that the appeal was not properly brought before the court on the ground that the order made by the learned President under section 51 of the Criminal Procedure Code was a procedural one and as such not appealable. By way of analogy they cited *Public Prosecutor v. Hoo Chang Chwen*⁽⁴⁾ and *Public Prosecutor v. R.K. Menon & Anor.*⁽⁵⁾ They also argued that even if it was not a procedural order or ruling, the learned President had made an interlocutory order and again was not appealable. For this they cited *Kashi Ram Khosla & Ors. v. Dikshir*⁽⁶⁾ and *Selangor United Rubber Estates Ltd. v. Craddock & others* (No. 2)⁽⁷⁾. After hearing arguments, I overruled the objection and held that the order made by the learned President was not a procedural ruling and that it was a final order. There were two Miscellaneous Criminal Applications supported by affidavits before the learned President, not on admissibility of evidence or any procedural matter but for an order to inspect and be furnished with certain documents in the possession of the prosecution before trial. In my view the order made by the learned President was a final order purportedly made under section 51, and therefore appealable under section 307(i) of the Criminal Procedure Code.

On the substantive issue in this appeal as to whether the learned President was correct in the exercise of his discretion in granting the order un-

A der section 51 of the Criminal Procedure Code, I hold the view that in this particular case, the order could not have been made under that section. In so far as the power of the court is concerned, section 51(i) C.P.C. provides:—

B “Whenever any court ... considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such court ... such court may issue a summons ... to the person in whose possession or power such property or document is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons ...”

C The word “person” is defined under the Interpretation Act, 1967 to include a body of persons, corporate or unincorporate. Thus, section 51(i) envisages a summons to be issued by the Court against any person (including the Public Prosecutor) to produce specified documents when it considers that the production of such documents is necessary or desirable for any of the purposes stated in that section. I agree with Seah J. in *Syed Abu Bakar bin Ahmad v. Public Prosecutor*⁽⁸⁾ that section 51 should be construed strictly.

E Although it appears to be so, that section is not intended to enable the defence in a criminal proceeding to ask for discovery of documents or inspection of documents from the prosecution before trial. As was said by Hepworth J. in *Public Prosecutor v. Teoh Choon Teck* (ante) at page 3:—

F “The need for this section would appear to be that in criminal cases neither party can obtain evidence from the opposite side by means of interlocutories or discovery of documents. The language of this section is very wide but before issuing a summons under it the court is bound to consider judicially whether the production of the documents is necessary or relevant for the purpose of the inquiry, trial or other proceeding.”

G He went on to say at the same page:—

H “The document or thing must be clearly specified, that is, it must indicate the document to be produced and should be given at such time as to afford the party a reasonable opportunity for producing the document at the trial. A general direction to produce all papers relating to the subject in dispute will not be enforced. It must be directed at a specific document.”

I The person served with the summons under section 51(i) can comply with its direction as provided in subsection (ii) or he can appear in court and explain why he cannot or need not produce the documents. Only then the court can make an order whether to allow or dismiss the application under that section. In my view, the court has no power to order production of documents without

first issuing a summons. The proper procedure would be for the requesting party to make an application for summons to be issued by the court against a particular person and to specify the documents or property required to be produced by such person. In the instant case, no summons had been issued, and on the facts no summons could have been issued, as the application was in too general a form in the case of Raymond Chia, and too all-embracing in the case of Zainal. So much so that they were in the nature of interlocutories or discovery of documents for which section 51 is never intended. In the circumstances, the learned President cannot be said to have exercised his discretion judicially in granting the order even if summons had been served on the Public Prosecutor, in the first instance.

Be that as it may, having perused the appeal record, I am of the view this is a proper case where I should exercise the court's power of revision in order to ensure that justice is not only done but seen to be done. To my mind the charge as it stands is insufficient to enable the applicants to properly prepare their defence. In complicated cases of forgery or cheating under the Penal Code, or sedition under the Sedition Act 1948 (revised 1969), it is of utmost importance that the charge should state with clarity in what manner the forgery, cheating or sedition had been committed. The practical way of doing this is to annex the particularisation of the offence to the charge. An accused person must be given such particulars as are reasonably sufficient to give him notice of the matter with which he is charged so that he can properly prepare his defence. This requirement can clearly be inferred from sections 152, 153 and 154 of the Criminal Procedure Code. It is provided under section 173(a) C.P.C. that when the accused appears or is brought before the court, a charge containing the particulars of the offence of which he is charged shall be framed. Section 153(i) Criminal Procedure Code goes on to say the charge shall contain such particulars as to the time and place of the offence and the person against whom or the thing in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged, and section 154 goes further to provide that when the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. In my view, in cases of forgery where various

A documents had been specifically referred to in the charge in respect of which the forgery was committed or by which the crime was perpetrated, the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instructions to his counsel before trial. It is true that in the present case the five documents referred to in the charge would be produced by the prosecution at the trial in order to prove their case, and as and when they are tendered in evidence, the accused can always apply for reasonable adjournments to enable their counsel to study them. But for practical purposes such adjournments could and should be avoided by furnishing them to the accused before trial. In this context, the defence is not afforded with discovery of documents but merely with further and better particulars of the charge on condition that by so doing the prosecution would in no way be prejudiced. The important thing is to keep a proper balance between the right of the accused to know exactly what the charge is against him so as to give him reasonable opportunity to prepare his defence, and the right of the prosecution not to disclose their evidence and the manner in which they are to prove their case before trial in order to sustain our adversary system of criminal justice. To what extent the right of the prosecution not to disclose documents specifically referred to in the charge before trial is qualified by the right of the accused to be given reasonable opportunity to prepare his defence is of crucial importance in the administration of criminal justice. To my mind, the answer must depend on the facts of each particular case. In forgery cases, what particulars are reasonably sufficient to give the accused notice of the matter with which he is charged must necessarily depend on the complexity and circumstances of each case. By their very nature the five documents specifically referred to in the present charge are not simple documents. In order that justice is not only done but seen to be done, the respondents are entitled to know, for example, which particular Bill of Lading, which Certificate of Origin and which certificate referring to motor tanker "GRACITA", they are alleged to have forged. For practical purposes, I would go so far as to say that in the circumstances of the present case, copies of the five documents ought to be annexed to the charge. Since the five documents have already been referred to in the charge, it is difficult to conceive how the prosecution can be prejudiced by supplying photostat copies of these documents to the respondents. On balance this is a case where the right of the accused to be given reasonable opportunity to prepare his defence overrides the

right of the prosecution to withhold documentary evidence before trial.

In the circumstances, although the respondents' applications were not properly made under section 51(i) of the Criminal Procedure Code and the order of the learned President must be set aside, I would exercise my power of revision and allow the first part of the order to remain on the ground that the respondents were entitled to further and better particulars of the charge to enable them to prepare their defence and give instructions to their counsel. Although I allow this appeal and set aside the order of the learned President, I order that photostat copies of the documents specifically referred to in the charge be supplied by the Public Prosecutor to the respondents.

Appeal allowed.

Solicitors: *Joseph & Son; Morris Edgar & Clough Thuraisingham.*

RE APPLICATION OF TAN OON & ORS. TAN OON & 20 ORS. v. PEMUNGUT HASIL TANAH, KUANTAN

[O.C.J. (George J.) July 29, 1982]

[Kuantan — Originating Motion No. 46 of 1981]

Land Acquisition — Delay in acquisition proceedings — Valuation — Adequacy of compensation owing to delay — Oppression on land owners — Objection filed by owners — Application for certiorari — Jurisdiction of court — Merit of application — Land Acquisition Act, 1960, ss. 4, 8, 10, 12-16, 37, 38(1)(5) & 68 — Federal Constitution, art. 13.

Administrative Law — Certiorari — Whether court has jurisdiction to grant order of certiorari in respect of compensation award made by Collector of Land Revenue.

Constitutional Law — Compulsory acquisition — Federal Constitution, art. 13.

The applicants were the registered owners of several parcels of land in the District of Kuantan. By *Gazette notification* dated May 11, 1972 the Government of the State of Pahang intended to acquire the said lands. The section 8 declaration was published in the *Gazette* dated February 13, 1975. The inquiry was commenced only on November 28, 1980 and was completed on January 17, 1981. The offer of compensation was made by the respondent on April 8, 1981. At the inquiry before the respondent, solicitors for the applicants submitted a valuation report on the said lands by a well-known firm of estate agents, surveyors and valuers who had valued the lands as at February 13, 1975 at \$31,837,500.00 and as at November 28, 1980 at about \$70,000,000.00. The respondent awarded and offered as compensation the amount of \$10,801,553.10 based on his opinion of the market value of the said lands as at February 13, 1975. On May 5, 1981 within the prescribed

A time each applicant filed an objection under sections 37 and 38(1) of the Land Acquisition Act, 1960. The issue on hearing of the objections would have to be what the true market value of the land was as at February 13, 1975, and not November 28, 1980. Because of the delay, the applicants applied for an Order of *certiorari* to quash the decision and award of compensation made by the respondent. B The basis of the application appeared to be that the whole process of acquisition had become a nullity and when he finally got down to conduct the section 10 inquiry the respondent had ceased to have jurisdiction to do so.

The State Legal Adviser on behalf of the respondent contended as a preliminary objection that the court had no jurisdiction to grant an order of *certiorari* in respect of C an award of compensation made by a Collector of Land Revenue in a land acquisition proceeding.

Held: (1) the court has the jurisdiction to entertain the motion for *certiorari*, and the preliminary objection was dismissed with costs;

(2) the dilatory nature of the proceedings had acted so D oppressively on the applicants as owners of the lands so as to make the compensation eventually awarded to them based on 1975 value to be no compensation at all;

(3) the delay of almost 6 years between the section 8 E notification and the holding of the section 10 inquiry caused the section 8 notice to be exhausted and of no effect, for the valuation of the land made in 1981, based on the date of the section 8 notification (February 13, 1975) would not provide adequate compensation to the applicants;

(4) the awards of the respondent were called in and quashed, with costs to the applicants.

Cases referred to:

- F (1) *R. v. Legislative Committee of the Church Assembly* [1928] 1 K.B. 411, 415.
- (2) *R. v. Electricity Commissioners* [1924] 1 K.B. 171, 204, 205.
- (3) *Nakkuda Ali v. M.F. De S. Jayaratne* [1951] A.C. 66, 78.
- (4) *Ridge v. Baldwin* [1964] A.C. 40.
- G (5) *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 M.L.J. 152, 154.
- (6) *State v. Kalicharan* A.I.R. 1965 Cal. 638.
- (7) *Ezra v. Secretary of State for India* L.R. 32 I.A. 93.
- (8) *Anisimic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.
- H (9) *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* [1980] 2 M.L.J. 165.
- (10) *Simpsons Motor Sales (London) Ltd. v. Hendon Corpn.* [1964] A.C. 1088, 1126.
- (11) *Doongarsee & Sons v. State of Gujarat* A.I.R. 1971 Gujarat 46 at 54.
- I (12) *Venkatama v. C.I. Trust Board* A.I.R. 1972 Mysore 193, 199.
- (13) *State of M.P. v. Vishnu Prasad* A.I.R. 1966 S.C. 1593.
- (14) *Krishna Iyer v. State of Madras* [1967] Madras L.J. Rep. 422.
- (15) *Kam Gin Paik & Ors. v. Pemungut Hasil Tanah Daerah Barat Daya, Pulau Pinang* [1983] 2 M.L.J. 59.